80-268

No. _____

Supreme Court, U. S.
FILED
AUG 21 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

v.

FREDERICK McCURRY
WALTER ROSENBAUM
DOMINIC CORVINO,
Petitioners

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioners
Frederick McCurry
Walter Rosenbaum
Dominic Corvino

QUESTION PRESENTED

Whether the Fifth Amendment right to indictment by an unbiased Grand Jury is violated when the prosecutor introduces before the Grand Jury prejudicial newspaper clippings about the gangland execution of an unindicted coconspirator and when the prosecutor compels one defendant in front of the Grand Jury to invoke his right to remain silent in excess of (100) one hundred times?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

v.

FREDERICK McCURRY
WALTER ROSENBAUM
DOMINIC CORVINO,
Petitioners

JOINT PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN NOS. 79-2773, 79-2774 and 79-2832.

OPINION BELOW

The judgment of the Court of Appeals dated July 1, 1980 affirming the judgment of the District Court is attached hereto as Exhibit "A". The order of the Court of Appeals dated July 25, 1980 denying a petition for rehearing in banc is attached hereto as Exhibit "B".

JURISDICTION

The judgment of the Court of Appeals affirming the District Court was entered on July 1, 1980. A petition for rehearing was denied by the Court of Appeals on July 25, 1980. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury...."

STATEMENT

Petitioners, Frederick McCurry, Walter Rosenbaum, Dominic Corvino, were indicted by a federal grand jury in the Eastern District of Pennsylvania and charged with various offenses essentially relating to trafficking in contraband cigarettes. On October 15, 1979, petition-

ers, McCurry, Rosenbaum and Corvino, entered conditional guilty pleas before the U.S. District Court for the Eastern District of Pennsylvania to various counts of the Indictment in conformity with the procedure approved in United States v. Zudick, 523 F.2d 848, 851-53 (3d Cir. 1975); United States v. Moskow, 588 F.2d 882 (3d Cir. 1978) and United States v. Birdman, 602 F.2d 547 (3d Cir. 1979).

On November 27, 1979, petitioners were sentenced by the District Court to various terms of custodial sentences.

Prior to entering their conditional guilty pleas, petitioners filed a Motion to Dismiss the Indictment alleging, inter alia, that the government used abusive and highly prejudicial tactics before the federal grand jury, specifically against petitioners McCurry and Rosenbaum.

During the grand jury testimony of his star witness, Edward Lee Bryan, the prosecutor introduced newspaper articles entitled "Slaying Victim Identified", "Body in Far Northeast Probably Ex-Convict" and "Body Identified as New Jersey

Crime Figure". These articles related to the discovery and identification in 1976 of the badly decomposed remains of one Michael J. Connelly, Sr. in a large green plastic trash bag. The articles stated that Connelly had two bullet wounds in the back of the skull and described his criminal record and prison sentences. One article even had the subtitle "New Jersey Man Had Extortion Record".

In this regard during Edward Lee Bryan's grand jury testimony of April 30, 1979, the following appears concerning the newspaper articles marked "Grand Jury Exhibits 3-B and 4-B":

"By Mr. Pichini" [the prosecutor]

Q. The articles that he sent you are marked as Grand Jury Exhibit 4-B; is that correct?

A. Yes. Those are the articles he sent to me.

Q. Is the correct summation of those articles that they relate that Mr. Connelly was apparently murdered and that his body was found in the far Northeast and that he had been missing since September, 1976 and that he was discovered, I believe, sometime in November, 1976?

A. That's right."

Connelly was named in the Indictment as an unindicted co-conspirator. The government's theory of the case was the Connelly and petitioner McCurry were partners in the cigarette smuggling enterprise until the demise of Connelly and that McCurry mailed these newspaper clippings to another member of the conspiracy. Despite the fact that "other crimes evidence" committed by an unindicted co-conspirator unrelated to the instant charges was inadmissible at trial, prosecutor proceeded to introduce into the grand jury such evidence and even the inadmissible fact of the Connelly killing.

The prosecutor then attempted to link petitioner McCurry, to the Connelly killing and infer that Mr. McCurry was responsible for the death of this major crime figure. During the grand jury testimony of March 3, 1979 of co-petitioner, Walter Rosenbaum, another principal in the cigarette smuggling operation, the prosecutor asked the following questions:

"Q. I hand you a picture of an individual. Do you know that individual to be Michael Connolly?

A. I invoke the Fifth Amendment.

Q. Isn't it a fact Michael Connolly was murdered in September 1976?

A. I invoke the Fifth Amendment.

Q. Do you know the reason why Mr. Connolly was murdered.

A. I invoke the Fifth Amendment.

Q. Did it have anything to do with cigarette smuggling?

A. I invoke the Fifth Amendment.

* * * * * * *

Q. We also have telephone toll records of Fred McCurry. Can you explain the tremendous number of calls between Mr. McCurry and Mr. --? Can you explain the large number of calls between Mr. McCurry in Philadelphia and Michael Connolly in Jersey during the period of time before or while Mr. Connolly was still alive?

A. I invoke the Fifth Amendment.

Q. Was Mr. Connolly reputed to be one of the best counterfeiters of cigarette tax heads to be in the business?

A. I invoke the Fifth Amendment.

Q. Do you intend to speak with any of the targets of this investigation following your appearance before the grand jury?

A. I invoke the Fifth Amendment?

During the interrogation of the same witness

on March 3, 1979, the prosecutor improperly branded Mr. McCurry as follows:

"Q. Isn't it a fact that Fred McCurry is reputed to be one of the major cigarette smugglers in the Philadelphia area?

A. I invoke the Fifth".

* * * * * * *

Q. Can you explain to the grand jury what subject was discussed other than cigarette smuggling in view of the status of Fred McCurry as a cigarette smuggler, and Southern Wholesale as a cigarette wholesaler."

The prosecutor's abusive tactics resulted in petitioner Rosenbaum being subpoenaed to the grand jury four times. His grand jury appearances of April 17, 1978 and April 24, 1978 reveal that Mr. Rosenbaum relied upon his Fifth Amendment privilege in declining to testify. The transcripts also reveal that the grand jury sought the witness' photograph and handwriting and fingerprint exemplars, which he agreed to furnish on May 1, 1978. Ten months later on March 3, 1979, Mr. Rosenbaum reappeared before the same grand jury and was forced by the prosecutor to assert his Fifth Amendment privilege over one hundred times. During Mr. Rosenbaum's grand

jury appearances, he was asked such irrelevant questions as to whether he had been a government informant or knew Don Yingling. Yingling was the F.B.I. agent assigned to this investigation. He was also badgered about his lack of funds to obtain counsel in comparison to the cash he had available to pay for smuggling cigarettes and practically threatened to secure a loan to pay a lawyer so as not to disrupt the grand jury's deliberations. On April 24, 1978, the prosecutor intermingled questions about Mr. Rosenbaum's attempt to secure representation and his indigency status with questions regarding cigarette smuggling, even after the witness clearly invoked his Miranda warnings the week before, clearly revealing his intentions to invoke his Fifth Amendment privilege.

The District Court in a Memorandum and Opinion of September 7, 1979, attached hereto as Exhibit "C", denying the Motion to Dismiss the Indictment did find and cite two instances of misconduct in reviewing the grand jury transcripts. As the Court stated:

"In my view, the only instances in which Mr. Pichini's [the prosecutor] conduct is properly subject to criticism were those involving the grand jury's attempts to obtain fingerprints and handwriting exemplars from three of the defendants. Mr. Pichini did become impatient with what he (understandably) regarded as the totally unjustified refusal of the three defendants to provide exemplars, and engaged in somewhat excessive exhortation on the subject. In the final analysis, however, he accurately advised the defendants of their rights, and scrupulously accorded them their just due. Perfection is not required.

The remaining item, which may not heretofore have been disclosed to the defendants, consisted of the following questions, addressed to a low-level employee of the company which was illegally supplying untaxed cigarettes (the surviving principal of which company is a defendant who had pleaded guilty and is cooperating with the government) concerning a deceased principal officer of that company:

'Q. Did Paul Vincent spend much time at the company?

A. No, sir.

Q. Were there any kind of rumors that he was into cocaine?

A. Yes, sir.

Q. What were the rumors?

A. Sir?

Q. What were the rumors? What were they saying?

A. I heard that he was into cocaine.'

Injecting rumors into the record by means of leading questions is plainly improper, but since this evidence had nothing to do with any of the defendants, they were plainly not prejudiced. Moreover, there is no rational basis for suggesting that the prosecutor was attempting to blacken the character of any of the defendants, or to mislead the grand jury concerning the defendants. In fairness to the prosecutor, it may be that he was trying to shed light on the peripheral question of why a relatively young and apparently successful businessman would have become involved in the smuggling enterprise, or perhaps seeking an explanation for Mr. Vincent's death (stated by other witnesses to have been from "natural causes") at a relatively early age. If that was his purpose, it is unfortunate that he chose the "rumor" approach. The entire episode is, however, insignificant for present purposes."

REASONS FOR GRANTING THE PETITION

The orders of the Court of Appeal in this case, if allowed to stand, will substantially impair defendants right to have an unbiased Grand Jury consider his case. In United States v. Serubo, 604 F.2d 814 (3d Cir. 1979), where the prosecutor engaged in improper, reprehensible and unacceptable misconduct before the grand jury, the court said as follows:

"In federal criminal proceedings, the right to indictment by an unbiased grand

> jury is guaranteed by the Fifth Amendment. Costello v. United States, 350 U.S. 359 (1956). When the framers of the Bill of Rights placed that requirement in the Fifth Amendment, 'they were not engaging in a mere verbal exercise'. United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972). The fact that grand jury proceedings are secret, exparte and largely under the control of the federal prosecutor, magnifies this concern. Aware of the potential for abuse inherent in grand jury proceedings, this court and others have increasingly exercised our supervisory power over the administration of justice to regulate the manner in which grand jury investigations are conducted. e.g., In re Grand Jury Proceeedings, 486 F.2d 85 (3d Cir. 1973) (Schofield I); United States v. Jacobs, 547 F,2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31, 98 S.Ct. 1873, 56 L.Ed.2d 53 (1978); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (Friendly, Jr.).

Only if your Honorable Court holds that in this case that prosecutorial misconduct before the Grand Jury constitutes a Fifth Amendment violation of the right to an indictment by an unbiased grand jury can the accused be assured that improper tactics will not be used by prosecutors before the grand jury. This same result can be achieved if your Honorable Court exercises your supervisory power over the administration of justice in Federal Courts to condemn the kind of prosecutorial misconduct resorted to in this case.

In Serubo, supra, the prosecutor, without any evidentiary foundation, attempted to link the defendants to organized crime which was a "blatant invitation to associate the petitioners with a disfavored class." Id. at 818. In the instant case, the prosecutor attempted to link petitioners McCurry and Rosenbaum to the gruesome slaying of Connelly, when in fact both the prosecutor and the agents knew that no evidence existed that petitioners were responsible for the slaying. Moreover, in Serubo, the court said the prosecutor's conduct violated The American Bar Association Standards admonishing that the prosecutor should give due deference to the grand jury's status as an independent legal body and that he should not make statements or arguments in an effort to influence the grand jury action in a manner that would be inadmissible at trial before a petit jury. Id. at 813. Here, the prosecutor knew that the newspaper articles about the slaying were inadmissible before the petit jury and therefore could only have introduced them before the grand jury in an attempt

to inflame the grand juror's against petitioners.

In Serubo, the prosecutor took it upon himself to improperly comment upon the veracity of witnesses before the grand jury, and impugned the testimony of other witnesses who failed to link the defendants to organized crime and hectored other uncooperative witnesses for their failure to comply with unrelated Federal laws. In the instant case, the prosecutor badgered and practically threatened petitioner Rosenbaum to get a lawyer to represent him and forced him to invoke his Fifth Amendment privilege before the grand jury over (100) one hundred times. The district court even independently found in the opinion of September, 1979 (Exhibit "C") that the prosecutor's conduct was subject to criticism in two respects. Through leading questions he interjected rumors about use of "cocaine" and also engaged in "excessive exhortation" with three defendants during their grand jury appearances.

Enough is known in this case and Serubo to substantiate the existance of flagrant and

persistent abuse of the grand jury.(1) The court's language in United States v. Serubo, 604 F.2d 814, 817 (3d Cir. 1979) bears repeating here:

> "Our reading of Birdman is that dismissal of the indictment may be proper even where no actual prejudice has been show, if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit. The view that dismissal of an indictment in the exercise of the supervisory power may be an appropriate remedy to correct flagrant or persistent abuse, despite the absence of prejudice to the defendant, is also accepted in the Second Circuit. See United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), cert, dismissed, 436 U.S. 431 (1978), (failure to provide warnings to grand jury target); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), (repeated use of hearsay evidence before the grand jury). (Emphasis added)."

Petitioners rights to have their cases considered by an unbiased grand jury were violated. Accordingly, your Honorable Court should consider this case either from the viewpoint of the constitutional violation or in the exercise of your supervisory power over the administration of criminal justice in the Federal courts.

---

(1) The same prosecutor handled the instant case and the Serubo case before the grand jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joel Harvey Slomsky

JOEL HARVEY SLOMSKY
Attorney for Petitioners

August, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2773/4/5 and 79-2832

UNITED STATES OF AMERICA,

Appellee,

v.

McCURRY, FREDERICK,

Appellant in 79-2773,

ROSENBAUM, WALTER,

Appellant in 79-2774,

BREGGAR, IRVING,

Appellant in 79-2775,

CORVINO, DOMINIC,

DOMENIC CORVINO,

Appellant in 79-2832.

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Crim. No. 79-00140-01

Argued June 11, 1980

Before HUNTER, WEIS and SLOVITER, Circuit Judges

Exhibit "A"
(17)

JUDGMENT ORDER

After consideration of the contentions raised by appellants, to wit: that the court erred in depriving appellants of their Fifth Amendment right to have an unbiased grand jury consider their case due to prosecutorial misconduct in the procurement of the instant indictment;

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affimed.

By the Court,

James Hunter, III, Circuit Judge

Attest:

Thomas F. Quinn, Clerk

Dated:

JUN 1 1980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 79-2773/74 and 79-2832

UNITED STATES OF AMERICA,
Appellee,

v.

FREDERICK McCURRY, WALTER ROSENBAUM, and DOMINIC CORVINO,
Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges

The petition for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James unter, III, Judge

Dated: July 25, 1980

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL

v.

FREDERICK McCURRY, et al. : NO. 79-140

MEMORANDUM AND ORDER

FULLAM, J. SEPTEMBER 7, 1979

In this complex, multi-defendant criminal proceeding arising from an alleged cigarette-smuggling operation of great magnitude, this Court held what amounted to an omnibus hearing on July 23, 1979, and ruled upon various pretrial motions filed by the defendants. Among other things, the Court deferred ruling on defense motion to dismiss the Indictment on the ground of prosecutorial misconduct.

On August 20, 1979, the Court of Appeals for the Third Circuit handed down its Opinion in the case of United States v. Serubo, et al., F.2d (3d Cir., Nos. 78-2505, 2506 and 2507); in that Opinion, the Court carefully re-examined the question of grand jury proceedings tainted by prosecutorial misconduct, and provided fresh insights concerning the proper exercise of a court's supervisory function in such circumstances.

The Grand Jury proceedings in the present case were conducted on behalf of the Government by the same attorney, a member of a Department of Justice Organized Crime Strike Force, who was found to have acted improperly in the Serubo case. The defendants have therefore now renewed, and indeed somewhat expanded, their challenges to the Indictment. I agree that it

is appropriate to reconsider the entire matter, in light of the intervening decision in Serubo.

I. THE HOLDING OF THE SERUBO CASE

In Serubo, the Court of Appeals had before it a partial transcript of the Grand Jury proceedings, containing the testimony of 32 of the total of 50 witnesses who appeared before one or more Grand Juries in that case. The partial transcript disclosed several instances of what the Court variously characterized as "improper, reprehensible and unacceptable" conduct, "egregious...misconduct" and "extreme" misconduct (misleading attempts to convey the impression that the defendants were connected with notorious organized crime figures, in the absence of any evidentiary basis for the accusation; and comments upon the credibility of witnesses); and several instances of "borderline" misconduct (badgering of uncooperative witnesses). The Court held that, if the Grand Jury which returned the indictments had been exposed to these instances of improper behavior by the prosecutor, the indictments should be dismissed, notwithstanding the fact that there may have been ample untainted evidence to justify the indictments.

It appeared, however, that most, and perhaps all, of the alleged misconduct had occurred before a predecessor Grand Jury, and the Court found it impossible to determine whether the indicting Grand Jury had read the tainted transcripts. On the other hand, there was also the possibility that additional instances of misconduct might have occurred in the course of the testimony of the 18 witnesses whose testimony had not yet been reviewed by the Court. In these circumstances, the Court ruled as follows: (1) the entire transcript should be disclosed to

the defendants; (2) the trial court should hold a further hearing (a) to determine whether the indicting Grand Jury had been exposed to the taint established by the record as thus far disclosed, and (b) to consider any additional instances of misconduct which might be revealed by the complete transcript; (3) if the indicting Grand Jury had indeed read the transcript which was before the Court of Appeals, the Indictments should be dismissed; (4) if the indicting Grand Jury had not been exposed to the established improprieties, the trial court should nevertheless consider whether the record which was before the indicting Grand Jury established prosecutorial misconduct which would justify dismissal; and (5) at the conclusion of the proceeding, the trial court should, in any event, forward the offending transcripts to the office of the Attorney General for appropriate disciplinary measures.

II. THE PROCEDURAL IMPLICATIONS OF THE SERUBO DECISION

In expressing its view that, in some circumstances, dismissal of an indictment for prosecutorial misconduct is an appropriate prophylactic measure notwithstanding the absence of prejudice to the defendant, the Court included the following language:

> "Our reading of Birdman [U.S. v. Birdman, F.2d (3d Cir., June 25, 1979)] is that dismissal of the Indictment may be proper even where no actual prejudice has been shown, if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit...

> "We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the Grand Jury process. Certainly the constant flow of cases to this Court involving prosecutorial misconduct before petit juries demonstrates that judicial 'tongue-clicking' and adjurations as to the 'better practice' are likely to have little impact on the problem...."

On the basis of the actual holding in Serubo, and on the basis of the quoted language from that Opinion, the defendants in the present case seek (1) immediate disclosure of the entire Grand Jury transcript, and (2) discovery concerning all other cases in which this particular Strike Force attorney has conducted Grand Jury proceedings. They argue that the former is necessary to reveal his conduct in the present case, and that the latter is necessary to enable them to mount an argument that prosecutorial misconduct is pervasive and calls for the prophylactic measure of dismissal. I reject these arguments.

In the first place, no amount of misconduct by the Strike Force attorney (Mr. Pichini) in other cases has any bearing upon the present case unless there was misconduct in the present case. The starting point, therefore, is an evaluation of his conduct in the present case. Only if it should develop (1) that there was serious misconduct in the present case and (2) that this Court declined to dismiss the Indictment, would the possibility of a pattern of misconduct established by other cases become even arguably relevant.

In the second place, the disclosures mandated in Serubo were post-trial disclosures. There is considerably less

need for circumspection in dealing with Grand Jury transcripts after judgment of conviction (following trial or, as in Serubo, a guilty plea), than before trial.

In short, I am persuaded that the Serubo Opinion was not intended, and should not be treated, as equivalent to a bill of attainder with respect to Mr. Pichini's participation in prosecutions, or as revolutionizing the law of Grand Jury secrecy and discovery in criminal cases.

It must nevertheless be conceded that the procedural implications of the Serubo decision are not altogether clear. The Government is unlikely to raise the issue of prosecutorial misconduct before the Grand Jury. The defendant has that right, but, generally speaking, is not in a position to learn of such misconduct, or to substantiate any charges he may make in that regard. But one may safely assume that defense counsel will not be hesitant to file such motions in virtually every case. How can such motions be decided, except by either disclosing the entire Grand Jury transcript to defense counsel, or reviewing the entire transcript in camera? Yet both of these alternatives are essentially unsatisfactory. Pretrial disclosure to defendants would gravely undermine the efficacy of the Grand Jury as an institution. In camera inspection by the Court would, in many cases, raise serious questions concerning the desirability of recusal. And either alternative would produce undesirable delay, antithetical to the purposes of the Speedy Trial Act.

Perhaps some of these difficulties could be alleviated by deferring the entire inquiry until after trial. Or it might be possible to establish a procedure for review of challenged transcripts by a federal magistrate or other neutral official.

Whatever additional procedural steps may become necessary in the wake of the Serubo holding, the fact remains that dismissal of an indictment for prosecutorial misconduct is unlikely to become a frequent occurrence. There is room for hope that, as prosecutors generally become familiar with the implications of Serubo, the presumption of regularity traditionally accorded Grand Jury indictments may again be safely indulged in by both defense counsel and the courts.

Without attempting to establish a general procedural approach applicable in all cases, I am satisfied that, at the very least, neither pretrial disclosure nor pretrial in camera inspection of the Grand Jury transcripts should occur in the absence of a colorable claim that misconduct may have occurred. Because a colorable basis for a claim of misconduct was established in the present case I have, at the defendants' request and with the concurrence of the Government, carefully reviewed all of the evidence submitted to the Grand Jury, including the transcripts of the testimony of some 26 witnesses, for the purpose of determining (1) whether there was prosecutorial misconduct which would justify outright dismissal of the Indictments, under the Serubo standards; and (2) if not, whether there was any evidence of misconduct sufficient to form a plausible basis for challenging the Indictment or for the imposition of other sanctions, so that, in fairness to the defendants, pretrial disclosure of the Grand Jury transcripts should be required, in order to enable the defendants to pursue the matter. For the reasons set forth below, I have concluded that no further disclosure is necessary, and that there is no reason to dismiss the Indictment or impose any other sanction.

III. THE MERITS

The instances which, at first blush, might be regarded as creating arguable grounds for a charge of prosecutorial misconduct fall into four categories. As to three of these categories, adequate disclosure of what occurred before the Grand Jury has already taken place: (1) references to, and newspapers articles concerning, the murder of one Michael Connolly; (2) questioning of the defendant Rosenbaum before the Grand Jury, notwithstanding his exercise of his rights under the Fifth Amendment; and (3) treatment of three defendants, Rosenbaum and the two Breggars, before the Grand Jury in connection with obtaining their fingerprints and handwriting exemplars.

There was a great deal of evidence before the Grand Jury to the effect that, from 1972 until shortly before his death in 1976, Michael Connolly was the "partner" of the defendant McCurry in organizing and operating the cigarette-smuggling enterprise; that serious disagreements arose between the two men, as a result of which the defendant McCurry terminated the "partnership;" that Connolly was found murdered; that the termination of the partnership and the later demise of Mr. Connolly were discussed among the conspirators (in tape-recorded conversations); and that McCurry mailed newspaper clippings concerning the murder to another member of the conspiracy (it was these clippings which were presented to the Grand Jury). I fail to see how the Grand Jury could properly have carried out its function of investigating the enterprise without becoming aware of the unfortunate fate of Mr. Connolly. Mr. Pichini's handling of this aspect of the proceeding was

exemplary. The sole source of information presented to the Grand Jury on this subject was the defendant McCurry. Mr. Pichini made no comment or argument on the subject.

Mr. Rosenbaum was called before the Grand Jury and asked a few questions about the case. In each instance, he exercised his Fifth Amendment privilege. The questioning was not prolonged, and when it became apparent that he was unwilling to cooperate, the questioning ceased. It is apparent that the principal purpose of the prosecutor was to afford Mr. Rosenbaum an opportunity to become a cooperative witness. He was not badgered; and the questions were based entirely upon other evidence properly submitted to the Grand Jury.

In my view, the only instances in which Mr. Pichini's conduct is properly subject to criticism were those involving the Grand Jury's attempts to obtain fingerprints and handwriting exemplars from three of the defendants. Mr. Pichini did become impatient with what he (understandably) regarded as the totally unjustified refusal of the three defendants to provide exemplars, and engaged in somewhat excessive exhortation on the subject. In the final analysis, however, he accurately advised the defendants of their rights, and scrupulously accorded them their just due. Perfection is not required.

The remaining item, which may not heretofore have been disclosed to the defendants, consisted of the following questions, addressed to a low-level employee of the company which was illegally supplying untaxed cigarettes (the surviving principal of which company is a defendant who has pleaded guilty and is cooperating with the Government) concerning a deceased principal officer of that company:

"Q. Did Paul Vincent spend much time at the company?

"A. No, sir.

"Q. Were there any kind of rumors that he was into cocaine?

"A. Yes, sir.

"Q. What were the rumors?

"A. Sir?

"Q. What were the rumors? What were they saying?

"A. I heard that he was into cocaine."

Injecting rumors into the record by means of leading questions is plainly improper, but since this evidence had nothing to do with any of the defendants, they were plainly not prejudiced. Moreover, there is no rational basis for suggesting that the prosecutor was attempting to blacken the character of any of the defendants, or to mislead the Grand Jury concerning the defendants. In fairness to the prosecutor, it may be that he was trying to shed light on the peripheral question of why a relatively young and apparently successful businessman would have become involved in the smuggling enterprise, or perhaps seeking an explanation for Mr. Vincent's death (stated by other witnesses to have been from "natural causes") at a relatively early age. If that was his purpose, it is unfortunate that he chose the "rumor" approach. The entire episode is, however, insignificant for present purposes.

The renewed Motion to Dismiss the Indictment will be denied.

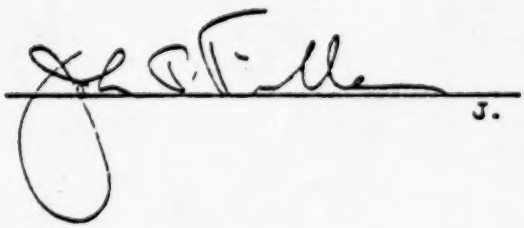
IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
v.		
FREDERICK McCURRY, et al.	:	NO. 79-140

O R D E R

AND NOW, this 7th day of September, 1979, it is hereby ORDERED that the Motion to Dismiss the Indictment is DENIED.



J.

No.
80-268

Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FREDERICK McCURRY
WALTER ROSENBAUM
DOMINIC CORVINO,
Petitioners

v.

UNITED STATES OF AMERICA

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOINT PETITION FOR A
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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL

v.

FREDERICK McCURRY, et al. : No. 79-140

MEMORANDUM AND ORDER

FULLAM, J. September 7, 1979

In this complex, multi-defendant criminal proceeding arising from an alleged cigarette-smuggling operation of great magnitude, this Court held what amounted to an omnibus hearing on July 23, 1979, and ruled upon various pre-trial motions filed by the defendants. Among other things, the Court deferred ruling on defense motion to dismiss the indictment on the ground of prosecutorial misconduct.

On August 20, 1979, the Court of Appeals for the Third Circuit handed down its Opinion in the case of United States v. Serubo, et al., F.2d (3d Cir., Nos. 78-2505, 2506 and 2507); in that Opinion, the Court carefully re-examined the question of grand jury pro-

ceedings tainted by prosecutorial misconduct, and provided fresh insights concerning the proper exercise of a court's supervisory function in such circumstances.

The Grand Jury proceedings in the present case were conducted on behalf of the Government by the same attorney, a member of a Department of Justice Organized Crime Strike Force, who was found to have acted improperly in the Serubo case. The defendants have therefore now renewed, and indeed somewhat expanded, their challenges to the Indictment. I agree that it is appropriate to reconsider the entire matter, in light of the intervening decision in Serubo.

I. THE HOLDING OF THE SERUBO CASE

In Serubo, the Court of Appeals had before it a partial transcript of the Grand Jury proceedings, containing the testimony of 32 of the total of 50 witnesses who appeared before one or more Grand Juries in that case. The partial transcript disclosed several instances of what the Court variously characterized as "improper, reprehensible and un-

acceptable" conduct, "egregious...misconduct" and "extreme" misconduct (misleading attempts to convey the impression that the defendants were connected with notorious organized crime figures, in the absence of any evidentiary basis for the accusation; and comments upon the credibility of witnesses); and several instances of "borderline" misconduct (badgering of uncooperative witnesses). The Court held that, if the Grand Jury which returned the indictments had been exposed to these instances of improper behavior by the prosecutor, the indictments should be dismissed, notwithstanding the fact that there may have been ample untainted evidence to justify the indictments.

It appeared, however, that most, and perhaps all, of the alleged misconduct had occurred before a predecessor Grand Jury, and the Court found it impossible to determine whether the indicting Grand Jury had read the tainted transcripts. On the other hand, there was also the possibility that additional instances of misconduct might have occurred in the course of the testimony of the 18 witnesses whose testimony had not yet been reviewed by

the Court. In these circumstances, the Court ruled as follows: (1) the entire transcript should be disclosed to the defendants; (2) the trial court should hold a further hearing (a) to determine whether the indicting Grand Jury had been exposed to the taint established by the record as thus far disclosed, and (b) to consider any additional instances of misconduct which might be revealed by the complete transcript; (3) if the indicting Grand Jury had indeed read the transcript which was before the Court of Appeals, the Indictments should be dismissed; (4) if the indicting Grand Jury had not been exposed to the established improprieties, the trial court should nevertheless consider whether the record which was before the indicting Grand Jury established prosecutorial misconduct which would justify dismissal; and (5) at the conclusion of the proceeding, the trial court should, in any event, forward the offending transcripts to the office of the Attorney General for appropriate disciplinary measures.

II. THE PROCEDURAL IMPLICATIONS OF THE SERUBO DECISION

In expressing its view that, in some circumstances, dismissal of an indictment for prosecutorial misconduct is an appropriate prophylactic measure notwithstanding the absence of prejudice to the defendant, the Court included the following language:

> "Our reading of Birdman [U.S. v. Birdman, F.2d (3d Cir., June 25, 1979)] is that dismissal of the Indictment may be proper even where no actual prejudice has been shown if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit...
>
> "We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand Jury process. Certainly the constant flow of cases to this Court involving prosecutorial misconduct before petit juries demonstrates that judicial 'tongue-clicking; and adjurations as to the 'better practice' are likely to have little impact on the problem..."

On the basis of the actual holding in Serubo, and on the basis of the quoted language from that Opinion, the defendants in the present case seek (1) immediate disclosure of the

entire Grand Jury transcript, and (2) discovery concerning all other cases in which this particular Strike Force attorney has conducted Grand Jury proceedings. They argue that the former is necessary to reveal his conduct in the present case, and that the latter is necessary to enable them to mount an argument that prosecutorial misconduct is pervasive and calls for the prophylactic measure of dismissal. I reject these arguments.

In the first place, no amount of misconduct by the Strike Force attorney (Mr. Pichini) in other cases has any bearing upon the present case unless there was misconduct in the present case. The starting point, therefore, is an evaluation of his conduct in the present case. Only if it should develop (1) that there was serious misconduct in the present case and (2) that this Court declined to dismiss the Indictment, would the possibility of a pattern of misconduct established by other cases become even arguably relevant.

In the second place, the disclosures mandated in Serubo were post-trial disclosures. There is considerably less need for circum-

spection in dealing with Grand Jury transcripts after judgment of conviction (following trial or, as in Serubo, a guilty plea), than before trial.

In short, I am persuaded that the Serubo Opinion was not intended, and should not be treated, as equivalent to a bill of attainder with respect to Mr. Pichini's participation in prosecutions, or as revolutionizing the law of Grand Jury secrecy and discovery in criminal cases.

It must nevertheless be conceded that the procedural implications of the Serubo decision are not altogether clear. The Government is unlikely to raise the issue of prosecutorial misconduct before the Grand Jury. The defendant has that right, but, generally speaking, is not in a position to learn of such misconduct, or to substantiate any charges he may make in that regard. But one may safely assume that defense counsel will not be hesitant to file such motions in virtually every case. How can such motions be decided, except by either disclosing the

entire Grand Jury transcript to defense counsel, or reviewing the entire transcript in camera? Yet both of these alternatives are essentially unsatisfactory. Pretrial disclosure to defendants would gravely undermine the efficacy of the Grand Jury as an institution. In camera inspection by the Court would, in many cases, raise serious questions concerning the desirability of recusal. And either alternative would produce undesirable delay, antithetical to the purposes of the Speedy Trial Act.

Perhaps some of these difficulties could be alleviated by deferring the entire inquiry until after trial. Or it might be possible to establish a procedure for review of challenged transcripts by a federal magistrate or other neutral official.

Whatever additional procedural steps may become necessary in the wake of the Serubo holding, the fact remains that dismissal of an indictment for prosecutorial misconduct is unlikely to become a frequent occurrence. There is room for hope that, as prosecutors generally become familiar with the implications of Serubo, the presumption of regularity

traditionally accorded Grand Jury indictments may again be safely indulged in by both defense counsel and the courts.

Without attempting to establish a general procedural approach applicable in all cases, I am satisfied that, at the very least, neither pretrial disclosure nor pretrial in camera inspection of the Grand Jury transcripts should occur in the absence of a colorable claim that misconduct may have occurred. Because a colorable basis for a claim of misconduct was established in the present case I have, at the defendants' request and with the concurrence of the Government, carefully reviewed all of the evidence submitted to the Grand Jury, including the transcripts of the testimony of some 26 witnesses, for the purpose of determining (1) whether there was prosecutorial misconduct which would justify outright dismissal of the Indictments, under the Serubo standards; and (2) if not, whether there was any evidence of misconduct sufficient to form a plausible basis for challenging the Indictment or for the imposition of other sanctions, so that, in fairness to the defendants, pretrial

disclosure of the Grand Jury transcripts should be required, in order to enable the defendants to pursue the matter. For the reasons set forth below, I have concluded that no further disclosure is necessary, and that there is no reason to dismiss the Indictment or impose any other sanction.

III. THE MERITS

The instances which, at first blush, might be regarded as creating arguable grounds for a charge of prosecutorial misconduct fall into four categories. As to three of these categories, adequate disclosure of what occurred before the Grand Jury has already taken place: (1) references to, and newspapers articles concerning, the murder of one Michael Connolly; (2) questioning of the defendant Rosenbaum and the two Breggars, before the Grand Jury in connection with obtaining their fingerprints and handwriting exemplars.

There was a great deal of evidence before the Grand Jury to the effect that, from 1972 until shortly before his death in 1976, Michael Connolly was the "partner" of the defendant

McCurry in organizing and operating the cigarette-smuggling enterprise; that serious disagreements arose between the two men, as a result of which the defendant McCurry terminated the "partnership;" that Connolly was found murdered; that the termination of the partnership and the later demise of Mr. Connolly were discussed among the conspirators (in tape-recorded conversations); and that McCurry mailed newspaper clippings concerning the murder to another member of the conspiracy (it was these clippings which were presented to the Grand Jury). I fail to see how the Grand Jury could properly have carried out its function of investigating the enterprise without becoming aware of the unfortunate fate of Mr. Connolly. Mr. Pichini's handling of this aspect of the proceeding was exemplary. The sole source of information presented to the Grand Jury on this subject was the defendant McCurry. Mr. Pichini made no comment or argument on the subject.

Mr. Rosenbaum was called before the Grand Jury and asked a few questions about the case.

In each instance, he exercised his Fifth Amendment privilege. The questioning was not prolonged, and when it became apparent that he was unwilling to cooperate, the questioning ceased. It is apparent that the principal purpose of the prosecutor was to afford Mr. Rosenbaum an opportunity to become a cooperative witness. He was not badgered; and the questions were based entirely upon other evidence properly submitted to the Grand Jury.

In my view, the only instances in which Mr. Pichini's conduct is properly subject to criticism were those involving that Grand Jury's attempts to obtain fingerprints and handwriting exemplars from three of the defendants. Mr. Pichini did become impatient with what he (understandably) regarded as the totally unjustified refusal of the three defendants to provide exemplars, and engaged in somewhat excessive exhortation on the subject. In the final analysis, however, he accurately advised the defendants of their rights, and scrupulously accorded them their just due. Perfection is not required.

The remaining item, which may not heretofore have been disclosed to the defendants, consisted of the following questions, addressed to a low-level employee of the company which was illegally supplying untaxed cigarettes (the surviving principal of which company is a defendant who has pleaded guilty and is cooperating with the Government) concerning a deceased principal officer of that company:

"Q. Did Paul Vincent spend much time at the company?

"A. No, sir.

"Q. Were there any kind of rumors that he was into cocaine?

"A. Yes, sir.

"Q. What were the rumors?

"A. Sir?

"Q. What were the rumors? What were they saying?

"A. I heard that he was into cocaine."

Injecting rumors into the record by means of leading questions is plainly improper, but since this evidence had nothing to do with any of the defendants, they were plainly not prejudiced. Moreover, there is no rational basis for suggesting that the prosecutor was

attempting to blacken the character of any of the defendants, or to mislead the Grand Jury concerning the defendants. In fairness to the prosecutor, it may be that he was trying to shed light on the peripheral question of why a relatively young and apparently successful businessman would have become involved in the smuggling enterprise, or perhaps seeking an explanation for Mr. Vincent's death (stated by other witnesses to have been from "natural causes") at a relatively early age. If that was his purpose, it is unfortunate that he chose the "rumor" approach. The entire episode is, however, insignificant for present purposes.

The renewed Motion to Dismiss the Indictment will be denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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O R D E R

AND NOW, this 7th day of September, 1979, it is hereby ORDERED that the Motion to Dismiss the Indictment is DENIED.

/s/

J.